



# Criminal Evidence: Character Evidence

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## I. Introduction

In some legal disputes, character may be an issue in a case. For example, in litigation to determine child custody, the fitness of a parent may be an issue. 1 BRANDIS & BROUN, NORTH CAROLINA ON EVIDENCE 273 (7th ed. 2011) (hereinafter BRANDIS & BROUN). In these cases, character evidence always is admissible and the only question remaining is the proper method of proof. *Id.* These situations, however, almost never arise in the criminal context. In criminal cases, character evidence typically only becomes an issue when the proponent seeks to introduce it to show that a person acted in conformity with that character on a particular occasion. This is often referred to as evidence of propensity. In this context, character evidence is offered as circumstantial evidence of guilt or innocence, and it constitutes substantive evidence. *Id.* at 278; *see, e.g., State v. Bogle*, 324 N.C. 190, 199 (1989) (the defendant is entitled to an instruction that his or her character evidence is substantive evidence of his or her innocence). For example, in a fraud case, the defendant may seek to introduce evidence of his or her character for scrupulous honesty to disprove the element of fraudulent intent. As described below, North Carolina Evidence Rule 404(a) sets out the general rule that character evidence is inadmissible as circumstantial evidence of conduct. However, as is explained below, there are several important exceptions to the general rule. In addition to discussing Rule 404(a), this bulletin covers Rule 405 (method of proving character evidence), Rule 607 (who may impeach), and Rule 608 (character of a witness). It also distinguishes character evidence from other types of evidence, such as prior bad acts and habit.

## A. Distinguished from 404(b) Evidence

Rule 404(b) allows for the admission of evidence of other crimes, wrongs, or acts for purposes *other than* to prove propensity. N.C. R. EVID. 404(b). Thus, for example, Rule 404(b) allows for admission of evidence that the defendant possessed incestuous pornography to show his intent to engage in sexual activity with his child. Rule 404(b) is a rule of inclusion that bars evidence in only one circumstance: when it is offered to show propensity. Thus, the distinction between Rules 404(a) and 404(b) is this: Rule 404(a) pertains to character evidence offered to prove propensity; Rule 404(b), by contrast, pertains to evidence offered for a purpose other than propensity. For a discussion of Rule 404(b), see JESSICA SMITH, *Rule 404(b): Evidence of Other Crimes, Wrongs, or Acts* (Mar. 2013), in *THE SURVIVAL GUIDE: SUPERIOR COURT JUDGES' BENCH BOOK* (UNC School of Government) (hereinafter *THE JUDGES' BENCH BOOK*), under "Evidence," [www.sog.unc.edu/node/1092](http://www.sog.unc.edu/node/1092).

## B. Distinguished from Habit

Habit and character are easily confused. A leading treatise distinguishes the two as follows:

Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness . . . . Habit . . . is more specific. It denotes one's regular response to a repeated situation. If we speak of a character for care, we think of the person's tendency to act prudently in all the varying situations of life—business, at home, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of responding to a particular kind of situation with a specific type of conduct. Thus, a person may be in the habit of bounding down a certain stairway two or three steps at a time, of patronizing a particular pub after each day's work, or of driving his automobile without using a seatbelt. The doing of the habitual act may become semi-automatic, as with a driver who invariably signals before changing lanes.

<sup>1</sup> MCCORMICK ON EVIDENCE 1081 (7th ed. 2013) (hereinafter MCCORMICK). It is generally understood that habit evidence is both more probative and less prejudicial than character evidence. *Id.* at 1082. Thus, while there are strict limits on the admissibility of character evidence in a criminal trial, the rules are more permissive concerning habit evidence.

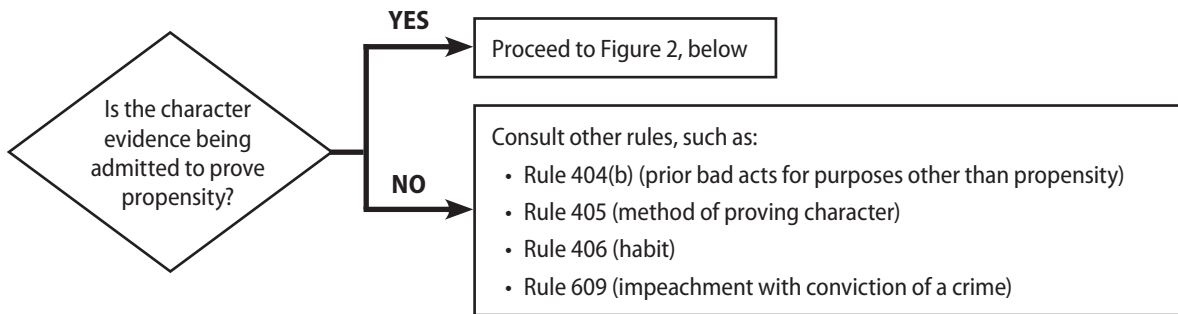
## C. Relevant Rules

The evidence rules pertaining to character evidence are set forth in Appendix A, [Character Evidence Rules](#).

## D. Analysis

Figures 1 and 2, below, illustrate the character evidence analysis. The sections that follow the figures flesh out the details of the analysis.

**Figure 1. Initial Determination in Character Evidence Analysis**



**Figure 2. When and How Character Evidence Is Admissible to Show Propensity**

<b>Evidence of Defendant's Character</b>		<b>Evidence of Victim's Character</b>		<b>Evidence of Witness's Character</b> (including defendants & victims who testify)
Defendant may introduce if it pertains to a pertinent trait	State may introduce only in rebuttal	Defendant may introduce if it pertains to a pertinent trait	State may introduce only in rebuttal of: (1) Defendant's evidence of a pertinent trait; or (2) Defendant's evidence that the victim was the first aggressor in a homicide case	Either side may use to attack or support credibility
<b>Method of Proof</b>				<b>Method of Proof</b>
<b>Reputation or Opinion</b>	<b>Specific Instances of Conduct</b>	<b>Reputation or Opinion</b>	<b>Specific Instances of Conduct</b>	
In all instances	(1) When character is an element of a charge or defense; or (2) On cross-examination of a witness who testified to opinion or reputation	To attack or support credibility but: (1) May refer only to character for truthfulness or untruthfulness and (2) Evidence of truthfulness is admissible only if witness's character for truthfulness has been attacked	(1) Prior conviction of a crime under Rule 609 (2) If probative of truthfulness or untruthfulness of the witness being examined or of another witness, as to which the witness being cross-examined has testified — in court's discretion — may not use extrinsic evidence	

## II. General Rule: Character Evidence Is Inadmissible to Show Propensity but Is Otherwise Admissible

Rule 404(a) states the general rule that evidence of a person's character or a trait of his or her character is not admissible to prove that he or she acted in conformity therewith on a particular occasion. N.C. R. EVID. 404(a). Rule 404(a) frequently is described as a "general rule of exclusion." *State v. Bogle*, 324 N.C. 190, 201 (1989). The rule is based on the notion that while propensity evidence has some probative value, that value is, as a general rule, exceeded by prejudice. 1 MCCORMICK at 1023.

The rule does not exclude all character evidence; it excludes character evidence only when offered to show propensity—that a person acted in conformity with that character. Thus, evidence of the defendant's reputation as a drug dealer is not admissible to show that the defendant is guilty of trafficking in drugs. *State v. Yancey*, 155 N.C. App. 609, 611 (2002) (the State's evidence improperly characterized the defendant as a drug dealer); *see also* *State v. Jolly*, 332 N.C. 351, 362–63 (1992) (witness's testimony about the defendant's failure to spend time with his sons was inadmissible character evidence); *State v. Payne*, 328 N.C. 377, 402–03 (1991) (prosecutor's questions as to whether the defendant's mother feared him improperly suggested that the defendant was dangerous to others); *State v. Bell*, 87 N.C. App. 626, 636 (1987) (witness improperly testified that she was "still afraid" of defendant; the only relevance of this evidence was to imply that the defendant was a violent person).

However, if the character evidence is not offered to show propensity, it is not prohibited by Rule 404(a); it is of course subject to the other rules of evidence, including Rule 405 on methods of proving character. 1 MCCORMICK at 1014 ("Character evidence that is not categorically excluded is admissible, subject to the other rules of evidence."). Thus, for example, "where extortion is charged, the defendant's reputation for violence may be relevant to the victim's state of mind"; in this instance evidence of the victim's state of mind is not being offered to show propensity and thus is not excluded by Rule 404(a). *Id.* at 1022; *see, e.g., State v. Alford*, 339 N.C. 562, 569 (1995) (evidence that the victim was peaceful and unarmed the night of the murder was not improper character evidence where it was relevant to prove, in part, that the murder was committed with premeditation and deliberation and motive); *State v. Barnes*, 77 N.C. App. 212, 216 (1985) (in a sexual offense case, the victim's testimony that she was afraid of the defendant—her father—and that he was mean was not character evidence; the evidence was offered to explain why the victim did not tell her mother about the incident).

Similarly, a murder defendant who asserts self-defense may offer evidence of the victim's violent character to show the reasonableness of the defendant's belief that he or she needed to use force. In this instance evidence of the victim's character is not being introduced to show the victim's propensity but, rather, the defendant's state of mind; such evidence is not excluded by Rule 404(a). 1 MCCORMICK at 1022; *see, e.g., State v. Watson*, 338 N.C. 168, 187–88 (1994). However, such evidence is relevant only where the defendant knew of the victim's character for violence. *Watson*, 338 N.C. at 187–88 (where there was no evidence that the defendant knew of the witness's opinion of the victim's dangerousness, the evidence was irrelevant as to whether the defendant's belief in the need to kill the victim was reasonable); *State v. Shoemaker*, 80 N.C. App. 95, 101–02 (1986) (the trial court properly precluded defense counsel from asking about a specific instance of violence by the victim where no evidence suggested that the defendant was aware of the incident).

### III. Exceptions to the General Rule

There are three important exceptions to the general rule that character evidence is inadmissible to prove propensity: one deals with the character of the defendant, a second with the character of the victim, and a third with the character of witnesses at trial. The sections below explore these exceptions.

#### A. Defendant's Character

##### 1. Defendant May Offer Evidence of a "Pertinent Trait" of Character

Rule 404(a)(1) provides that a defendant may offer evidence of a "pertinent trait" of his or her character. This subsection does not allow the admission of all evidence regarding the defendant's character; to be admissible, the defendant's evidence must pertain to a character trait that is relevant to an issue in the case. *State v. Squire*, 321 N.C. 541, 546, 549 (1988) (trial court properly sustained the State's objection to defense counsel's question regarding the defendant's general reputation in the community); *State v. Bogle*, 324 N.C. 190, 198 (1989) (same; citing *Squire*); *State v. Wagoner*, 131 N.C. App. 285, 292–93 (1998) (in a sexual assault case, evidence of the defendant's general psychological make-up was not "pertinent" to the commission of a sexual assault); *State v. Fultz*, 92 N.C. App. 80, 83 (1988) (the trial court properly excluded evidence of the defendant's general character and reputation). Although cases sometimes confuse the issue, the relevant question "is not whether a trait is general or specific, but whether it is relevant to the proceeding." *Squire*, 321 N.C. at 549 (indicating that "general traits of character are not less relevant because they are general" and holding that the trial court committed prejudicial error by precluding the defendant from offering evidence of his good character traits other than peacefulness and truthfulness); *State v. Banks*, 191 N.C. App. 743, 747 (2008) (stating that "although [character] traits may be general in nature, they are no less relevant than specific traits of character").

##### 2. "Pertinent Trait"

A pertinent trait is a relevant trait and is defined by reference to Rule 401 on relevancy. *See, e.g., Squire*, 321 N.C. at 547–48; *Bogle*, 324 N.C. at 198 (same; citing *Squire*). "Thus, in determining whether evidence of a character trait is admissible under Rule 404(a)(1), the trial court must determine whether the trait in question is relevant; i.e., whether it would 'make the existence of any fact that is of consequence to the determination of the action' more or less probable than it would be without evidence of the trait." *Squire*, 321 N.C. at 547–48 (quoting Rule 401); *see generally* JESSICA SMITH, *Relevancy* (Mar. 2010), in *THE JUDGES' BENCH BOOK*, under "Evidence," [www.sog.unc.edu/node/2192](http://www.sog.unc.edu/node/2192). Because Rule 404(a) generally excludes character evidence, the exception permitting a defendant to offer evidence of a "pertinent trait" is narrowly construed. *Bogle*, 324 N.C. at 201.

As discussed in the subsections immediately below, one characteristic—law-abidingness—is almost always pertinent. Other traits may be pertinent depending on the context or circumstances. Typically, this means that the trait must "bear a special relationship to or be involved in the crime charged." *Bogle*, 324 N.C. at 201 (emphasis in original); *Wagoner*, 131 N.C. App. at



292 (quoting *Bogle*). For example, for a defendant charged with a crime of violence, character for peacefulness is pertinent; if a defendant is charged with embezzlement, character for honesty is pertinent. *Wagoner*, 131 N.C. App. at 292. Compare *State v. Cotton*, 99 N.C. App. 615, 619 (1990) (where the defendant was charged with burglary and sexual assaults, “neither the defendant’s evidence that he was a good employee nor the State’s rebuttal evidence of his bad conduct toward fellow employees” was relevant to the charged offenses), with *State v. Powell*, 340 N.C. 674, 691 (1995) (the trial court erred by excluding character evidence of the defendant’s reverence and respect for his mother where that trait was relevant; the State’s evidence raised the implication that the defendant declined to swear to his innocence on his mother’s grave because he knew he was guilty; error not prejudicial).

#### a. Law-abidingness

The character trait of being law-abiding is “nearly always relevant” in a criminal case. *Squire*, 321 N.C. at 548; *Bogle*, 324 N.C. at 198 (this trait is “‘pertinent’ in virtually all criminal cases”); *State v. Valladares*, 165 N.C. App. 598, 604–05 (2004) (trial court erred by excluding evidence of law-abidingness); *State v. Banks*, 191 N.C. App. 743, 746–47 (2008) (same). “Evidence of law-abidingness tends to establish circumstantially that defendant did not commit the crime charged.” *Bogle*, 324 N.C. at 198.

The fact that the defendant does not have any prior convictions is not evidence of law-abidingness. As the North Carolina Supreme Court has explained: “Whereas being ‘law-abiding’ addresses one’s *trait of character* of abiding by all laws, a lack of convictions addresses only the *fact* that one has not been convicted of a crime. Many clever criminals escape conviction.” *Bogle*, 324 N.C. at 200 (emphasis in original) (evidence of a lack of convictions should not have been admitted as character evidence). Nor does the fact that a defendant was honorably discharged from the military constitute admissible character evidence of law-abidingness. *State v. Mustafa*, 113 N.C. App. 240, 246 (1994) (rape case).

#### b. Peacefulness

When a defendant is charged with a crime of violence, the defendant’s peaceable character is a pertinent trait. *Banks*, 191 N.C. App. at 748 (in a murder and felonious discharge of a firearm case, the trial court committed prejudicial error by excluding evidence of the defendant’s peaceful and law-abiding character); see generally *Bogle*, 324 N.C. at 201 (stating the general rule); *Wagoner*, 131 N.C. App. at 292–93 (same).

#### c. Honesty and Truthfulness

The North Carolina Supreme Court has explained that “[t]ruthfulness and honesty are closely related concepts. [The dictionary] defines ‘truthful’ as ‘telling or disposed to tell the truth.’ . . . It defines ‘honest’ as ‘free from fraud or deception.’ . . . In common usage, a person is ‘truthful’ if he *speaks* the truth. He is ‘honest’ if his *conduct*, including his speech, is free from fraud or deception.” *Bogle*, 324 N.C. at 201 (emphasis in original, citations omitted). When a defendant is charged with a crime such as embezzlement, the defendant’s honesty is a pertinent character trait. *Wagoner*, 131 N.C. App. at 292 (giving this scenario as an example). By contrast, the traits of truthfulness and honesty are not pertinent to drug trafficking, *Bogle*, 324 N.C. at 202; *State v. Valladares*, 165 N.C. App. 598, 605 (2004), or impaired driving. *State v. MacCardwell*, 133 N.C. App. 496, 508 (1999).

As discussed below, if the defendant testifies at trial, evidence of the defendant’s honesty may be admissible, in certain circumstances, to support his or her credibility.

#### **d. Sobriety/Lack of Drug Use**

In a drug trafficking case, evidence that the defendant did not use drugs is a pertinent character trait, similar to sobriety. *State v. Moreno*, 98 N.C. App. 642, 646 (1990) (so holding but concluding that evidence that the defendant did not deal in drugs was evidence of a fact—as opposed to a character trait—and thus was inadmissible).

### **3. Prosecution May Rebut the Defendant's Evidence**

If a defendant introduces evidence of a pertinent trait of character under Rule 404(a)(1), the State may introduce evidence of the same in rebuttal. *See, e.g., State v. Duke*, 360 N.C. 110, 121–22 (2005) (when the defendant introduced evidence of his character for peacefulness, the State could rebut with evidence regarding his violence against two people); *State v. Roseboro*, 351 N.C. 536, 552–53 (2000) (where the defendant placed his character at issue by having family members testify about his reputation for nonviolence and peacefulness, the State could cross-examine these witnesses about accusations that the defendant had been violent toward his wife); *State v. Gappins*, 320 N.C. 64, 70 (1987) (after the defendant's character witnesses testified regarding his reputation for peacefulness, the prosecution could cross-examine them about the defendant's acts of domestic cruelty and rowdy and abusive conduct when drinking); *State v. Williams*, \_\_\_ N.C. App. \_\_\_, 724 S.E.2d 654, 655–56 (2012) (when the defendant's mother testified that the defendant was a “peacemaker,” the State could cross-examine her about the defendant's prior convictions). For a discussion of the type of character evidence that the prosecution may use in rebuttal, see the discussion below.

Rule 404(a)(1) only allows the State to introduce evidence of a pertinent trait of the defendant's character in rebuttal; if the defendant has not introduced such evidence, the State's evidence is inadmissible *See, e.g., State v. Lynch*, 334 N.C. 402, 411 (1993) (error to allow the State to introduce evidence of defendant's character where the defendant did not introduce evidence of a pertinent character trait); *State v. Thaggard*, 168 N.C. App. 263, 278 (2005) (same). A defendant's brief summary of his or her criminal record does not put his or her character at issue and thus does not open the door to the State's evidence in rebuttal. *Lynch*, 334 N.C. at 411.

### **4. When the Defendant Testifies**

When the defendant testifies as a witness at trial, character evidence also may be used to attack or support the defendant's credibility. Two sections below discuss when evidence regarding a witness's character is admissible.

## **B. Victim's Character**

### **1. Defendant May Offer Evidence of a “Pertinent Trait” of the Victim's Character**

A defendant may offer evidence of a pertinent trait of the victim's character. N.C. R. EVID. 404(a)(2). For a general discussion of what constitutes a “pertinent trait,” see the section entitled “Pertinent Trait,” above.

#### **a. Rape Shield Law**

In sexual assault cases, evidence regarding a victim's sexual history may require an analysis under the Rape Shield Law. For information about that evidentiary rule, see Jeff Welty, *Special*



*Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant*, ADMIN. OF JUST. BULL. No. 2009/04 (UNC School of Government Aug. 2009), included in THE JUDGES' BENCH BOOK, [www.sog.unc.edu/node/2195](http://www.sog.unc.edu/node/2195).

### **b. Violence/Aggression**

When the defendant asserts self-defense, the victim's character for violence is a pertinent character trait, *State v. Jacobs*, 363 N.C. 815, 818–23 (2010), in that it may show that

- the defendant's fear or apprehension was reasonable and, as a result, that the defendant's belief in the need to defend was also reasonable; or
- the victim was the aggressor.

*State v. Watson*, 338 N.C. 168, 187 (1994).

As discussed in the section entitled "General Rule: Character Evidence Is Inadmissible to Show Propensity but Is Otherwise Admissible," above, when a defendant offers evidence of the victim's character for violence known to the defendant to show that the defendant's fear was reasonable, Rule 404(a)(2) does not apply. As explained above, in this instance, the character evidence is not being admitted to show the victim's propensity for violence but, rather, to prove the defendant's state of mind. Because the character evidence is not being admitted to show propensity, Rule 404(a)(2) has no application. Note that although Rule 404(a)(2) does not apply, Rule 405 on form of proof (discussed in more detail below) does.

However, when the defendant offers evidence of the victim's character to show that the victim was the first aggressor, Rule 404(a)(2) applies. In this instance the evidence is being introduced to show circumstantially that because the victim had a violent character, he or she was the first aggressor in this instance. *Watson*, 338 N.C. at 187–88. In this context, it does not matter whether the victim's violent character was known or unknown to the defendant. *Id.*

When the defendant does not assert self-defense, evidence of the victim's aggression has been held inadmissible. *State v. Abraham*, 338 N.C. 315, 351–53 (1994) (where there was no claim of self-defense, evidence of the victim's aggressiveness was not relevant); *State v. Jacobs*, 195 N.C. App. 599, 606–08 (2009) (the trial court properly excluded evidence of the victim's prior convictions where no claim of self-defense was raised).

### **c. Drunkenness**

In a rape case, the state court of appeals rejected a defendant's argument that the victim's drunkenness was pertinent to his defense of consent. *State v. Cronan*, 100 N.C. App. 641, 644 (1990) (indicating that "proffered testimony as to the victim's alcohol consumption with other people . . . ha[d] no tendency to prove that the victim consented to sexual activity with the defendant").

## **2. Prosecution May Offer Evidence in Rebuttal**

When the defendant admits evidence of a pertinent trait of the victim's character, the State may offer character evidence in rebuttal. N.C. R. EVID. 404(a)(2). This rule is strictly limited to rebuttal. *See, e.g., State v. Wilkerson*, 363 N.C. 382, 421 (2009) (the trial court erred when it admitted the State's evidence regarding the victim's reputation for peacefulness where the defendant had not offered any evidence regarding the victim's character); *State v. Wells*, 185 N.C. App. 733 (2007) (unpublished) (error to allow the State in its case-in-chief to have the victim's mother testify that the victim was well respected, peaceful, a leader, a caring father, generous, and church-going).

Defense counsel's forecast in an opening statement of the victim's bad character evidence does not constitute introducing evidence for purposes of this rule. *State v. Buie*, 194 N.C. App. 725, 729 (2009) (the trial court erred by allowing the State to introduce evidence about the victim's character where the defendant had offered no evidence about her character but defense counsel had called her character into question in opening statement). *But see State v. Murillo*, 349 N.C. 573, 600 (1998) (not referencing the character evidence rules).

### 3. Homicide Cases

Rule 404(a)(2) provides that the prosecution may introduce evidence of the victim's character for peacefulness in a homicide case to rebut defense evidence that the victim was the first aggressor. N.C. R. EVID. 404(a)(2); *State v. Faison*, 330 N.C. 347, 354–55 (1991). Thus, for example, in a case in which the defendant claimed that he killed the victim after the victim forced him at gunpoint to perform oral sex, the defendant's evidence triggered the "first aggressor" exception and the State was properly allowed to introduce evidence of the victim's peacefulness. *Faison*, 330 N.C. at 355.

This rule does not allow the State to introduce evidence of the victim's peaceful character in its case-in-chief; the evidence only may be introduced in rebuttal after the defendant introduces evidence that the victim was the first aggressor. *Id.* at 355–56 (trial court erred by allowing the State to introduce evidence of the victim's character of peacefulness in its case-in-chief). Defense counsel's comments in an opening statement about the victim being the first aggressor do not constitute introduction of evidence by the defense. *Id.* at 356.

### 4. When Victim Testifies

When the victim testifies at trial, character evidence may be used to attack or support the victim's credibility. Sections below address this issue.

## C. Witness's Character

Rule 404(a)(3) allows, in certain circumstances, for the admissibility of evidence regarding a witness's character. The rule applies to a non-party witness, such as an eyewitness, as well as to a defendant or victim who testifies at trial. Specifically, it provides that evidence of a witness's character may be admitted as provided in Rules 607, 608, and 609. Those rules allow either party to attack or support a witness's credibility with character evidence. N.C. R. EVID. 607 (a witness's credibility may be attacked by either side); N.C. R. EVID. 608 (opinion, reputation, and specific act evidence to attack or support credibility); N.C. R. EVID. 609 (impeachment by evidence of conviction of a crime).

Character evidence relevant to credibility is evidence that concerns character for truth and veracity, as opposed to other character traits such as law-abidingness or peacefulness. 1 BRANDIS & BROUN at 285–86. Thus, the defendant may, for example, offer evidence that the victim-witness has a reputation for lying. *State v. Thaggard*, 168 N.C. App. 263, 276 (2005) (such evidence was proper).

The specific methods of attacking a witness's credibility and impeaching a witness are discussed below.

## D. Character of Other Persons Inadmissible to Show Propensity

Evidence of the character of a person who is not a witness, a defendant, or a victim is inadmissible to show propensity. N.C. R. EVID. 404(a); *State v. McBride*, 173 N.C. App. 101, 105 (2005) (in a case in which the defendant was charged with possessing drugs and drug paraphernalia at a motel room, the trial court erred by admitting the State's character evidence regarding the defendant's brother, who was outside the room when the police arrived, and regarding a third person who was inside the room; the evidence showed that the defendant's brother had a reputation for being a drug user and that the third person had the reputation for being a drug dealer).

## IV. Methods of Proving Character

There are three ways of proving character: testimony about reputation, opinion testimony, and evidence of specific acts. N.C. R. EVID. 405. These rules apply both when the character evidence is being admitted for propensity under Rule 404(a), *see* "Exceptions to the General Rule," above, and when it is admitted for some other proper purpose. *See* "General Rule: Character Evidence Is Inadmissible to Show Propensity but Is Otherwise Admissible," above; *State v. Watson*, 338 N.C. 168, 187 (1994) (character evidence not admitted for propensity is subject to Rule 405). The sections that follow flesh out the relevant rules regarding when these various types of evidence may be used.

### A. Proving the Defendant or Victim's Character

#### 1. Reputation or Opinion Testimony

In all cases where evidence of character or a trait of character of a defendant or victim is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. N.C. R. EVID. 405(a). As explained in the section entitled "Exceptions to the General Rule," above, character evidence is admissible to prove propensity in only a limited set of circumstances. When propensity evidence is admissible, it may be proved by reputation or opinion evidence. *See, e.g., State v. Bogle*, 324 N.C. 190, 199 (1989) (a defense witness may testify that the defendant has a reputation for being law-abiding and may express the opinion that the defendant possesses this pertinent character trait). And as was explained in the section entitled "General Rule: Character Evidence Is Inadmissible to Show Propensity but Is Otherwise Admissible," above, character evidence offered for a purpose other than propensity is more broadly admissible. When this is the case, reputation or opinion evidence may be used to prove character. *See Watson*, 338 N.C. at 187 (explaining that a defendant arguing self-defense may demonstrate his or her reasonable fear by offering opinion testimony concerning victim's character trait for violence when defendant knows of such opinion).

#### a. Foundation

A proper foundation must be offered for reputation or opinion evidence. For reputation evidence, the proponent must lay "a proper foundation showing the testifying witness has sufficient contact with the community to qualify as having a credible opinion or knowing what kind of

reputation the other witness has.” *State v. Thaggard*, 168 N.C. App. 263, 275 (2005) (internal quotation marks omitted); *State v. Morrison*, 84 N.C. App. 41, 47–48 (1987) (same; foundational requirement was not satisfied); see generally NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 7.2(A) (2d ed. 2006) (sample foundation for this purpose) (hereinafter EVIDENTIARY FOUNDATIONS).

The foundational requirement for opinion testimony is less stringent. Specifically, the proponent only needs to establish that the witness is testifying from personal knowledge; a foundation of a long acquaintance is not required. *Morrison*, 84 N.C. App. at 48–49 (all that was needed as a foundation for a witness’s opinion as to the victim’s character for truth and veracity was personal knowledge gained in the course of her position as the victim’s supervisor at work); *State v. Hernandez*, 184 N.C. App. 344, 349 (2007) (proper foundation for opinion testimony as to a witness’s character for truthfulness is personal knowledge); see generally EVIDENTIARY FOUNDATIONS § 7.2(B) (sample foundation for this purpose).

## 2. Specific Instances of Conduct

Unless the defendant or the victim testifies as a witness, see “Proving a Witness’s Character,” below, specific instances of conduct may be used to prove a defendant or victim’s character in only two situations: (1) when the defendant or victim’s character is an element of a charge, claim, or defense and (2) on cross-examination of a witness who testified to opinion or reputation of the defendant or victim’s character. When the defendant or the victim testifies, specific instances of conduct may be used as discussed in the section below entitled “Proving a Witness’s Character.”

### a. When Permitted

#### i. Character Is an Element

When a person’s character or character trait is an essential element of a charge, claim, or defense, proof may be made of specific instances of conduct. N.C. R. EVID. 405(b). In criminal cases, a person’s character is rarely an essential element of a charge, claim, or defense. One of the rare instances when this occurs is when the defendant asserts self-defense. An element of that defense is that the defendant reasonably believed in the need to defend against some threat of harm. JOHN RUBIN, *THE LAW OF SELF-DEFENSE IN NORTH CAROLINA* 25 (1996). Because the reasonableness of the defendant’s fear of harm from the victim is an essential element of the defense, evidence of specific instances of conduct indicating the victim’s character for violence, when known to the defendant, is allowed as probative of this element. *Id.* at 174 & n.46 (citing cases).

By contrast, the defendant’s character is never an essential element of self-defense. *State v. Dennison*, 163 N.C. App. 375, 383 (2004), *rev’d on other grounds*, 359 N.C. 312 (2005) (“raising a self-defense claim does not interject a defendant’s character into the proceedings, and a defendant’s character is not an essential element of a self-defense claim”; the trial court committed prejudicial error by allowing the State to introduce specific instances of conduct evidence pertaining to the defendant’s character for violence).

#### ii. On Cross-Examination of Witness Who Testified to Opinion or Reputation

When one side has introduced reputation or opinion evidence of character, the other side may, on cross-examination, make inquiry into relevant specific instances of conduct. N.C. R. EVID. 404(a). Thus, if a defense witness testifies about the defendant’s reputation for peacefulness,

the State may ask the witness if he or she knew that the defendant had beaten his wife. *State v. Gappins*, 320 N.C. 64, 69–70 (1987) (after character witnesses testified regarding the defendant’s reputation for peacefulness, the prosecution could cross-examine them about whether they had heard of or knew about the defendant’s acts of domestic cruelty and rowdy and abusive conduct when drinking); *State v. Williams*, \_\_\_ N.C. App. \_\_\_, 724 S.E.2d 654, 656 (2012) (when the defendant’s mother testified that the defendant was a “peacemaker,” the State could cross-examine her about the defendant’s prior convictions). While it is proper to inquire into specific instances of conduct on cross-examination, it is improper to ask the witness whether he or she knew that the defendant had been arrested or charged in connection with a specific instance of conduct. *State v. Wells*, 185 N.C. App. 733 (2007) (unpublished) (quoting *State v. Martin*, 322 N.C. 229, 238 (1988) (improper for the State to reference the fact that the defendant has previously been arrested or charged with a crime; “the fact that the defendant had been charged with a crime does not show he is guilty of the crime”). Additionally, cross-examination must be limited to the character trait testified about on direct examination. EVIDENTIARY FOUNDATIONS § 7-2(D).

### iii. *Exclusive List of Circumstances*

As noted, unless a defendant or victim testifies, the two circumstances discussed above are the only ones where specific act character evidence is admissible. *See, e.g., State v. Murphy*, 172 N.C. App. 734, 743–44 (2005), (the trial court did not err by limiting the defendant’s witnesses to testimony regarding defendant’s reputation for peacefulness and precluding specific acts evidence; in this child murder case, the defendant wanted to ask his witnesses about his specific acts of nonviolence towards other children), *vacated on other grounds*, 361 N.C. 164 (2006).

### b. Foundation

When a party cross-examines a witness about character, the party must have a good faith basis for any specific instances noted in cross-examination. 1 MCCORMICK at 1066 n.31 (“It has been clear for some time that propounding a question in bad faith about a prior crime or wrong is ground for reversal.”); EVIDENTIARY FOUNDATIONS § 7-2(D) (cross-examiner must have a good faith basis in fact for inquiring about specific acts, but the basis need not be independently admissible); *cf. State v. Cummings*, 332 N.C. 487, 507 (1992).

A specific instance of conduct is relevant if it rebuts the earlier reputation or opinion testimony offered by the defendant; there is no time limit on the instances of conduct that may be the subject of cross-examination. *Cummings*, 332 N.C. at 507 (in a case where the offense at issue occurred in 1986, it was proper for the State to ask the defendant’s character witnesses about an assault committed by the defendant in 1963); *State v. Rhue*, 150 N.C. App. 280, 284–85 (2002) (in a case where the offense occurred in 1999, it was proper for the State to cross-examine the defendant’s character witnesses about an assault committed by the defendant in 1980).

## B. Proving a Witness’s Character

Evidence Rule 608 governs the methods of proving a witness’s character. When the defendant or the victim testifies as a witness, this rule applies.



### **1. Reputation or Opinion Regarding Truthfulness/Untruthfulness**

As noted in the section entitled “Witness’s Character,” above, either side may use character evidence to attack or support a witness’s credibility. Reputation or opinion evidence may be used to do this but may refer only to character for truthfulness or untruthfulness. N.C. R. EVID. 608(a). Thus, for example, if the State’s Witness A testifies as an eyewitness to the crime, the defendant may proffer Witness B to testify to A’s reputation for untruthfulness.

#### **a. Evidence of Truthfulness Admissible Only After Truthfulness Has Been Attacked**

Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked. N.C. R. EVID. 608(a). Continuing with the example used in the subsection immediately above, after the defendant’s Witness B has testified that the State’s Witness A has a reputation for untruthfulness, the State may proffer Witness C to testify to the opinion that A is a truthful person.

#### **b. Foundation**

The foundational requirements for reputation and opinion evidence are discussed in the section above entitled “Proving the Defendant or Victim’s Character.”

### **2. Specific Instances of Conduct**

#### **a. To Impeach under Rule 609**

Specific instances of conduct may be used to impeach a witness under Rule 609 with evidence of conviction of a crime. N.C. R. Evid. 608(b). Extrinsic evidence may be used for this purpose. Rule 609 is discussed in detail in JESSICA SMITH, *Rule 609: Impeachment by Evidence of Conviction of a Crime* (Feb. 2013), in THE JUDGES’ BENCH BOOK, under “Evidence,” [www.sog.unc.edu/node/3156](http://www.sog.unc.edu/node/3156).

#### **b. Inquiry on Cross If Probative of Truthfulness or Untruthfulness**

Rule 608(b) provides that in the trial court’s discretion, specific instances of conduct may, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness about the witness’s character for truthfulness or untruthfulness or about the character for truthfulness or untruthfulness of another witness as to whose character the witness being cross-examined has testified. N.C. R. EVID. 608(b).

##### **i. Only Applies to Character for Truthfulness/Untruthfulness**

Under Rule 608(b), the only character trait relevant to the issue of credibility is truthfulness or untruthfulness; the focus is on “whether the conduct sought to be inquired into is of the type which is indicative of the actor’s character for truthfulness or untruthfulness.” *State v. Morgan*, 315 N.C. 626, 634 (1986). Examples of the types of conduct that fall into this category are:

- use of a false identity,
- making false statements on affidavits, applications, or government forms, including tax returns,
- giving false testimony,
- attempting to corrupt or cheat others, and
- attempting to deceive or defraud others.



*Morgan*, 315 N.C. at 635; *State v. Syriani*, 333 N.C. 350, 382 (1993); *State v. Bishop*, 346 N.C. 365, 391 (1997) (trial court properly allowed cross-examination about allegations that the defendant forged another's name on both a loan application and a check and that she cashed the check without the other person's permission; the purpose of the inquiry was to show conduct indicative of defendant's character for untruthfulness); *State v. Bell*, 338 N.C. 363, 383 (1994) (trial court erred by prohibiting the defendant from questioning a witness about his act of misrepresenting himself to his friend while his accomplices stole or attempted to steal his friend's belongings; the misrepresentations were probative of the witness's veracity).

By contrast, the following types of conduct are not probative of veracity:

- sexual relationships or proclivities,
- the bearing of illegitimate children,
- use of drugs or alcohol,
- assaultive acts, or
- acts of burglary.

*Bell*, 338 N.C. at 382–83 (unrelated acts of larceny and drug possession were not probative of the witness's propensity for truthfulness or untruthfulness); *State v. Scott*, 318 N.C. 237, 243 (1986) (cross-examination of sexual activities was improper under Rule 608(b)); *State v. Morgan*, 315 N.C. 626, 635 (1986) (instances of the defendant's assaultive behavior on another were not probative of truthfulness or untruthfulness); *State v. Harris*, 323 N.C. 112, 128 (1988) (rejecting the State's attempt to characterize its cross-examination of the defendant about a fight in which he was involved as a means of impeaching the defendant's credibility); *State v. McEachin*, 142 N.C. App. 60, 68 (2001) (witness's acts of burglary were not probative of truthfulness or untruthfulness); *State v. Wilson*, 118 N.C. App. 616, 620 (1995) (prosecutor's cross-examination of the defendant regarding her prior drug use was improper); *State v. Rowland*, 89 N.C. App. 372, 382 (1988) (cross-examination regarding the defendant's drug addiction was improper). Thus, as a general rule, specific instances of this type of conduct should not be admitted to prove untruthfulness. However, if the defendant opens the door, evidence of this type of conduct may be allowed. *State v. Darden*, 323 N.C. 356, 358 (1988) (when asked on direct examination whether he robbed or injured the victim, the defendant stated that he did not rob or injure the victim "or anyone else"; the trial court did not abuse its discretion by allowing the State to cross-examine the defendant about his prior instances of violent conduct that injured others; the court reasoned: "[t]he accuracy of defendant's assertion that he had not injured anyone else was probative of his truthfulness or untruthfulness, and the trial court thus could, in its discretion, allow cross-examination regarding the assertion").

#### ii. *Discretionary Decision; Rule 403 Applies*

The rule expressly provides that cross-examination about specific acts to attack or support credibility is in the trial judge's discretion. N.C. R. EVID. 608(b). Some of the factors that may be considered in the exercise of discretion include:

- the importance of the witness's testimony,
- the relevancy of the act of misconduct to truthfulness,
- the remoteness of the act with respect to the trial date,
- whether inquiry will lead to time-consuming, distracting explanations on cross-examination or recross-examination,

- whether there will be unfair humiliation of the witness, and
- whether there will be undue prejudice to the party who called the witness.

1 MCCORMICK at 251. Additionally, Rule 403 may further limit such examination. *Morgan*, 315 N.C. at 634; see generally JESSICA SMITH, *Rule 403* (Jan. 2013), in *THE JUDGES' BENCH BOOK*, under "Evidence," [www.sog.unc.edu/node/2193](http://www.sog.unc.edu/node/2193).

### iii. *Extrinsic Evidence*

Except in connection with impeachment under Rule 609 and as discussed above, specific instances of a witness's conduct, for the purpose of attacking or supporting his or her credibility, may not be proved by extrinsic evidence. N.C. R. EVID. 608(b); *Morgan*, 315 N.C. at 634. In this context, extrinsic evidence means evidence obtained by any means other than cross-examination of the witness. *State v. Lee*, 189 N.C. App. 474, 478 (2008). Thus, the witness's answer "is conclusive and cannot be contradicted by other testimony." 1 BRANDIS & BROUN at 335; see also 1 MCCORMICK at 252–53. The cross-examiner may, of course, press the witness by, for example, reminding the witness of penalties for perjury; he or she may not, however, call other witnesses to prove the discrediting act. 1 MCCORMICK at 253.

### iv. *Foundation*

Any questions about specific acts must be based on information and asked in good faith. 1 BRANDIS & BROUN at 333–34; 1 MCCORMICK at 251.

## C. Expert Testimony

Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior. N.C. R. EVID. 405(a); 608(a); see, e.g., *State v. Thaggard*, 168 N.C. App. 263, 273–74 (2005) (trial court erred by admitting opinion testimony from a medical expert that the victims were truthful).

## V. Trial Practice

There are two criminal pattern jury instructions on character evidence, N.C.P.I.—105.30 (evidence relating to the character of a witness, including the defendant); 105.60 (evidence of a defendant's character), and these should be given when such evidence is admitted. *State v. Bogle*, 324 N.C. 190, 199–200 (1989) (the trial court erred by denying the defendant's request for a jury instruction indicating that the jury could consider the defendant's evidence of law-abidingness as substantive evidence).

**Appendix A. Character Evidence Rules****Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.**

- (a) Character evidence generally. – Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
- (1) Character of accused. – Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
  - (2) Character of victim. – Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
  - (3) Character of witness. – Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

*[Section (b) is not reproduced here]*

**Rule 405. Methods of proving character.**

- (a) Reputation or opinion. – In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.
- (b) Specific instances of conduct. – In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

**Rule 607. Who may impeach.**

The credibility of a witness may be attacked by any party, including the party calling him.

**Rule 608. Evidence of character and conduct of witness.**

- (a) Opinion and reputation evidence of character. – The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- (b) Specific instances of conduct. – Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

*Source: N.C. R. EVID. 404, 405, 607, & 608.*

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